



May 31, 2001

Ms. Larissa T. Roeder
Assistant District Attorney
County of Dallas
Frank Crowley Courts Building, LB 19
Dallas, Texas 75207

OR2000-2258

Dear Ms. Roeder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147377.

The Dallas County District Attorney's Office (the "D.A.") received a request for all files, records, and any other documents in the possession of the district attorney pertaining to a certain criminal defendant (the "defendant") who was convicted of murder and is currently on death row, including but not limited to those pertaining to or arising from 1) the investigation of the crime, 2) the arrest, 3) the trial of the underlying matter or plea negotiations, and 4) the investigation or prosecution of any proceedings after trial, including motions for new trial and direct appeal. You indicate that you have made some information available to the requestor. However, you have submitted representative samples¹ of the remaining information in your Exhibits 1- 25, and claim that information contained in all the exhibits save numbers 1, 5, 6, and 25² is excepted from disclosure under sections 552.101,

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²Exhibits 1 and 25 contain copies of the original request, the D.A.'s request for decision under the Public Information Act, and the D.A.'s brief to this office concerning that request. Exhibit 5 is illustrative in that it contains a list of information released through the criminal trial discovery process. Exhibit 6 is a list illustrating information filed with the criminal trial court pursuant to law.

552.103, 552.108, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you assert that all of the D.A.'s files in this case are excepted from disclosure under section 552.103. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

You inform us that the capital murder case concluded in a conviction that has been affirmed by the Court of Criminal Appeals. From this, we must conclude that the investigation is completed. Section 552.022 provides, in relevant part:

(a) without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from disclosure under this chapter unless they are expressly confidential under other law:

1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

Accordingly, the information is public and the D.A. may not withhold the requested information under section 552.103 because that section is not "other law" which makes the information confidential. See Open Records Decision No. 473 at 2 (1987) (section 552.103 protects a governmental body's litigation interest and does not make information confidential). Because you have asserted section 552.108 and various confidentiality statutes, we will consider whether information in the completed investigation is excepted from public disclosure under those provisions.

With respect to Exhibit 7, you assert that the information is excepted from disclosure under section 552.101 in conjunction with chapter 411 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains,

except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have reviewed the documentation and have marked the CHRI which must be withheld from disclosure under section 552.101 of the Government Code.

Additionally, Exhibit 7 contains compilations of criminal history. Under *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), where an individual's criminal history information has been compiled or summarized by a governmental entity, the information takes on a character that implicates the individual's right of privacy in a manner that the same individual records in an uncompiled state do not. We have marked the information which must be withheld under section 552.101 and *Reporters Committee*.

Exhibits 7, 11, 12, and 18 contain information excepted from disclosure under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers, copies of drivers' licenses, and license plate numbers which appear in Exhibits 7, 11, 12, and 18 under section 552.130. We have marked the numbers and licenses for your convenience.

In addition, Exhibits 7, 9, 11, and 13 contain social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act,

42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the D.A. pursuant to any provision of law, enacted on or after October 1, 1990.

Exhibit 7 also contains records relating to a juvenile criminal matter. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. Law enforcement records pertaining to conduct occurring before January 1, 1996 are governed by the former section 51.14(d), which was continued in effect for that purpose. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591 (Vernon).

The records at issue concern juvenile conduct that occurred prior to January 1, 1996. Therefore, the records are confidential under the former section 51.14(d) of the Family Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code. We have marked the report for your convenience.

Exhibit 8 contains grand jury transcripts, which you assert are confidential under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure. Article 20.02 provides that the proceedings of the grand jury shall be secret. Crim. Proc. Code art. 20.02(a). Accordingly, we conclude that the information in Exhibit 8 must be withheld from disclosure under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure.

Exhibit 9 contains information which you contend is confidential under section 552.101 in conjunction with chapter 159 of the Occupations Code, known as the Medical Practice Act (the "MPA"). Some of the records at issue are medical records, access to which is governed by the MPA. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

We note that the requestor is the attorney for one subject of the medical records. The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the medical records that you must withhold pursuant to the MPA.

Exhibit 10 contains autopsy photographs which you assert are confidential under section 552.101 in conjunction with article 49.25 of the Code of Criminal Procedure. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. We conclude that the autopsy photographs in Exhibit 10 must be withheld from disclosure.

Exhibit 11 contains victim impact statements which you contend are confidential under section 552.101 in conjunction with section 508.313 of the Government Code. In pertinent part, section 508.313 states:

- (a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

This provision accords confidentiality to the records of the Board of Pardons and Paroles. Open Records Decision No. 190 at 2 (1978); *see also* Attorney General Opinion H-427 (1974); Open Records Decision No. 33 (1974). It does not, however, make confidential records in the custody of the D.A.. Thus, the victim impact statements are not confidential pursuant to section 508.313 of the Government Code. However, portions of the statements contain information confidential under section 552.101.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We conclude that portions of the statements contain intimate or highly embarrassing information which is of no legitimate interest to the public, and have marked those portions to be withheld under section 552.101 and common law privacy.

With respect to Exhibit 13, you contend that the information consists of school records which are confidential under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Accordingly, section 552.114 does not apply, because the D.A.'s office is not an educational institution. Thus, the D.A. may not withhold Exhibit 13 under section 552.114.

Regarding the information in Exhibits 14-24, you contend that the requested information is excepted from disclosure under sections 552.108(a)(3) and 552.111 of the Government Code. Section 552.108(a)(3) provides as follows:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108.

You explain that the information was created by an attorney representing the state in preparing for criminal litigation, and that the gathering of information about witnesses and prior criminal records, and the collecting of written statements “exemplify strategic work done by the state to prepare for litigation.” Based upon your representation, we conclude that some of the information may be withheld pursuant to section 552.108(a)(3). We have marked the information accordingly.

As for your section 552.111 claim, our office has previously concluded that section 552.111 is a discretionary exception. See Open Records Decision No. 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception). Accordingly, the section 552.111 exception does not constitute “other law” that makes information confidential for purposes of section 552.022. Gov't Code § 552.022. Therefore, you may not withhold the information under section 552.111.

In summary, you must withhold the marked information in Exhibit 7 under section 552.101 in conjunction with section 411.083 of the Government Code and *Reporters Committee*. Also in Exhibit 7, you must withhold the marked juvenile criminal records under section 552.101 and section 51.14(d) of the Family Code. You must redact the marked driver's license numbers, drivers' licenses, and license plate numbers in Exhibits 7, 11, 12, and 18 under section 552.130. You must withhold the grand jury transcripts in Exhibit 8 under section 552.101 and article 20.02 of the Code of Criminal Procedure. In Exhibit 9, you must withhold the marked medical documents under section 552.101 and the MPA. You must withhold the autopsy photographs in Exhibit 10 under section 552.101 and section 11 of article 49.25 of the Code of Criminal Procedure. In Exhibit 11, you must withhold the marked redactions under section 552.101 and common law privacy. With respect to Exhibits 14-24, you may withhold the information we have marked pursuant to section 552.108(a)(3). The remainder of the information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

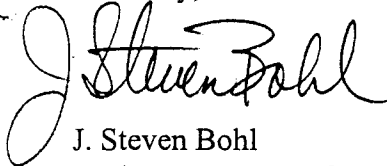
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Steven Bohl". The signature is fluid and cursive, with a large initial "J" and a stylized "B".

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 147377

Encl. Marked documents

cc: Ms. Lydia M. V. Brandt
P.O. Box 850843
Richardson, Texas 75085-0843
(w/o enclosures)